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Case No.____

IN THE
Supreme Court of the United States

TERM, _____

MELVIN JEFFERSON, individually
and as the Administrator of the
Estate of Alberta K. Jefferson;
LEON JEFFERSON; and BENJAMIN JEFFERSON,
Petitioners,

vs.

CITY OF TARRANT, ALABAMA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
ALABAMA SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a claim for money damages against a municipality in the State of Alabama, brought pursuant to 42 U.S.C. §1983, will lie where death has resulted from the constitutional deprivation complained of. The issue presents itself because 42 U.S.C. §1983 does not contain a survivorship provision. This "gap" is closed by 42 U.S.C. §1988 which states that where the civil rights statutes are deficient in providing a remedy, "The common law, as modified and changed by the Constitution and statutes of the state wherein the Court having jurisdiction of such civil or criminal case is held, *so far as the same is not inconsistent with the Constitution and laws of the United States*, shall extend to and govern . . . " 42 U.S.C. §1988.

In a case brought in Alabama, the survivorship provision that becomes operative pursuant to §1988 is the Alabama Wrongful Death Act. Ala. Code §6-5-410 (1975). The Alabama Wrongful Death Act has been held to provide for the recovery of punitive damages only. *See e.g., King v. National Spa and Pool*, 607 So. 2d 1241, 1246 (Ala. 1992).

This Court, in *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981), has held that municipalities are immune from punitive damages. When presented with these precedents, the Alabama Supreme Court, following *Carter v. City of Birmingham*, 444 So. 2d 373 (Ala. 1983), held that no §1983 claim survives, and plaintiffs proceeding in a death case against a municipality are left with a state law cause of action that limits damages to \$100,000.00 by Ala. Code §11-93-2 (1975), and that does not provide for the fees and expenses available to a prevailing §1983 litigant. The Alabama Supreme Court's decision presents the following issue: Is the application of the Alabama Wrongful Death Statute in such a way that it would bar §1983 actions against a municipality in any case where death is

the result of the constitutional deprivation, leaving litigants with only a severely limited state law claim inconsistent with the Constitution and laws of the United States?

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IN THE
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_____ TERM, _____

MELVIN JEFFERSON, individually
and as the Administrator of the
Estate of Albert K. Jefferson;
LEON JEFFERSON; and BENJAMIN JEFFERSON,
Petitioners,

v.

CITY OF TARRANT, ALABAMA,
Respondents.

**PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF ALABAMA**

Melvin Jefferson, individually and as the Administrator of the Estate of Alberta K. Jefferson; Leon Jefferson; and Benjamin Jefferson respectfully petition for a writ of certiorari to review the judgment of the Supreme Court of Alabama in this case.

OPINION BELOW

The opinion of the Supreme Court of Alabama (App. A-I) is reported as *Jefferson v. City of Tarrant, Ala.*, ___ So. 2d ___, 1996 Ala. Lexis 185 (Ala. Sup. Ct. 1996). The opinion of the Circuit Court for Jefferson County, Alabama is unreported.

JURISDICTION

The Alabama Supreme Court released its opinion on July 12, 1996. Rehearing was denied by the Alabama Supreme Court on August 30, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. §1257.

STATUTORY PROVISIONS INVOLVED

The statutes involved in this appeal are 42 U.S.C. §1983, 42 U.S.C. §1988, and Ala. Code §6-5-410 (1975), which are reproduced at Appendix A-II.

STATEMENT OF THE CASE

Petitioners, Melvin Jefferson, individually and as the Administrator of the Estate of Alberta K. Jefferson, Leon Jefferson, and Benjamin Jefferson, sued the City of Tarrant, Alabama in the Circuit Court for Jefferson County, Alabama. The Complaint was filed on or about June 20, 1994.

A. *The Underlying Action*

The action arises out of a fire on December 4, 1993 at 6017 57th Street North, Tarrant City, Alabama, which was

the residence of plaintiff Benjamin Jefferson, and Alberta K. Jefferson, the decedent.

Mrs. Jefferson was an elderly black woman who had had both of her legs amputated as the result of diabetes, and was only able to get about by the use of a wheelchair. The fire resulted in the death of Alberta K. Jefferson. The evidence before the trial court was that the firefighters were aware that this house was located in a predominantly black section of the City of Tarrant, Alabama. The fire resulted in the death of Alberta K. Jefferson. The City of Tarrant Fire Department personnel, including the acting chief, were aware of the neighborhoods in their territory that were predominantly black, and which were predominantly white. The firefighters described the neighborhood where this fire took place as not typical for Tarrant, and "a little bit more unkempt".

The evidence before the trial court was that the City of Tarrant Fire Department did not treat black and white sections of town equally. This disparity of treatment between the predominantly black sections of town and the predominantly white sections of town, and the death of Alberta K. Jefferson, led to the filing of a claim under 42 U.S.C. §1983 for the denial of equal protection of the laws to black citizens. Plaintiffs' claim is that a pattern and custom of denying protective services to disfavored minorities exists in the City of Tarrant, Alabama, and led to the death of Mrs. Jefferson. Such denials are generally redressable by §1983 actions. *See, Moody v. City of Hoboken*, 758 F. Supp. 1027, 1031 (D.N.J. 1991), citing *DeShaney v. Winnebago County*, 109 S.Ct. 998 (1989) (State "may not . . . selectively deny its protective services to certain disfavored minorities without violating the equal protection clause.")

B. Proceedings Below

This lawsuit was initiated by the filing of a Complaint on June 20, 1994. One of the plaintiffs, Melvin Jefferson, brought the action both individually, and as the personal representative of the decedent, Alberta K. Jefferson. Melvin Jefferson, as the representative of Alberta K. Jefferson's estate, brought state law claims under Ala. Code §6-5-410 (1975), the Alabama Wrongful Death Act, and 42 U.S.C. §1983. Leon and Benjamin Jefferson, and Melvin Jefferson in his individual capacity, brought claims for intentional infliction of emotional distress, and for the Alabama common law tort of outrage.

The Circuit Court for Jefferson County, Alabama, considered a motion for summary judgment and a motion for judgment on the pleadings, together with evidentiary exhibits. This appeal arises out of the Circuit Court for Jefferson County, Alabama's ruling, and the Supreme Court of Alabama's reversal thereof, on the legal issue presented by the City of Tarrant, Alabama's Motion for Judgment on the Pleadings.

The trial court denied the City of Tarrant's Motion for Judgment on the Pleadings, but entered a Statement of the Circuit Court Judge certifying that the interlocutory order denying the Judgment on the Pleadings for the City of Tarrant, Alabama involved a controlling question of law suitable for immediate appeal pursuant to Rule 5 of the Alabama Rules of Appellate Procedure. The City of Tarrant, Alabama filed a petition for permission to appeal from the trial court's Order on July 17, 1995. On August 23, 1995, the Alabama Supreme Court entered an order permitting the City of Tarrant, Alabama to appeal from the interlocutory order entered on July 17, 1995.

On July 13, 1996, the Alabama Supreme Court reversed the ruling of the Circuit Court for Jefferson County, Alabama, and remanded the case for further

proceedings, holding that an action against a municipality under 42 U.S.C. §1983 could not lie where a death resulted from the wrong complained of by the plaintiff. The Alabama Supreme Court relied upon *Carter v. City of Birmingham*, 444 So. 2d 373 (Ala. 1983), cert. denied 467 U.S. 1211 (1984), in making its decision, and specifically rejected the interpretation holding in *Weeks v. Benton*, 649 F. Supp. 1297 (S.D. Ala. 1986), which held that the application of the Alabama Wrongful Death Statute in *Carter* was inconsistent with the underlying 42 U.S.C. §1983. The Court denied a timely filed motion for rehearing on August 30, 1996.

REASONS FOR GRANTING THE PETITION

A. The Alabama Supreme Court, In Upholding *Carter v. City of Birmingham*, Has Applied The Alabama Wrongful Death Act, Contrary To 42 U.S.C. §1988, In A Manner That Is Inconsistent With The Constitution And Laws Of The United States, And Violates The Supremacy Clause Of The Constitution.

The Alabama Supreme Court, in following *Carter v. City of Birmingham*, 444 So. 2d 373 (Ala. 1983), has applied the Alabama Wrongful Death Act to a §1983 claim in a manner that is inconsistent with the Constitution and laws of the United States. In so doing, the Alabama Supreme Court not only has ignored the express provisions of 42 U.S.C. §1988, the provision that refers §1983 litigants to the Alabama Wrongful Death Act, but it has ignored the dictate of the U. S. Supreme Court that a federal right cannot be defeated by forms of local practice. *Felder v. Casey*, 108 S.Ct. 2302, 2314 (1988).

The civil rights statutes do not contain a survivorship provision. However, the remedy for this deficiency is provided by 42 U.S.C. §1988. This section provides that

where the federal civil rights laws are not suitable to carry into effect the provisions contained therein, the relevant state law will apply. However, the applicability of state procedural vehicles for bringing §1983 actions is specifically limited by §1988:

The jurisdiction . . . shall be exercised and enforced in conformity with the laws of the United States, so long as such laws are suitable to carry the same into effect; but in all cases where they [federal civil rights statutes] are not adapted to the object, or are deficient in the provision necessary to furnish civil remedies and punish offenses against the law, the common law . . . *so far as the same are not inconsistent with the Constitution and laws of the United States*, shall be extended to and govern said courts in the trial and disposition of the cause . . .

42 U.S.C. §1988 (emphasis added).

The Alabama Supreme Court in this case, following *Carter v. City of Birmingham*, 444 So. 2d 373 (Ala. 1983), continues to apply the Alabama Wrongful Death Act in §1983 claims against municipalities in such a manner that no §1983 action may be brought. This application has granted Alabama municipalities immunity from §1983 actions in death cases.

Only one federal court has directly decided the issue presented by the case at bar. The U. S. District Court for the Southern District of Alabama in *Weeks v. Benton*, 649 F. Supp. 1297 (S.D. Ala. 1986), directly repudiated the *Carter* analysis upon which the Alabama Supreme Court's decision in this case rests. In *Weeks*, the Court explained why the application of Ala. Code §6-5-410 (1975) under *Carter* is "inconsistent with the Constitution and laws of the United States." *Weeks*, 649 F. Supp. at 1304.

To begin its analysis, the *Weeks* Court cited *Robertson v. Wegman*, 98 S.Ct. 1991 (1978) for the test to be used in

determining whether the application of a state statute is inconsistent with the Constitution and laws of the United States:

Correct analysis requires a determination of whether the application of a state statute in a particular case has the result not merely of causing the plaintiff's claim to fail, but also of undermining the policies of compensation and deterrence underlying §1983.

Weeks, 649 F. Supp. at 1305, citing *Robertson, supra*.

The opinion of the Alabama Supreme Court, citing *Carter*, holds that because the Alabama Wrongful Death Act provides for punitive damages only, and because the U. S. Supreme Court held in *City of Newport v. Fact Concerts, Inc.*, 101 S.Ct. 2748 (1981) that municipalities are immune from punitive damages, a §1983 claim cannot lie against a municipality where the constitutional injury results in death. This holding, however, ignores the clear mandate of 42 U.S.C. §1988 which puts the Alabama Wrongful Death Act at issue in the first place. That is, that state provisions will only be relied upon so far as the same are not inconsistent with the Constitution and laws of the United States. Moreover, the effect of *Carter* and the Alabama Supreme Court's decision in this case, is to deny a federal cause of action because the constitutional wrong resulted in death as opposed to a lesser injury.

The policies underlying §1983 claims, according to *Robertson*, are "compensation of persons injured by deprivation of federal rights, and prevention of abuses of power by those acting under color of state law." *Robertson*, 98 S.Ct. at 1995. The Alabama Supreme Court's decision in this case is not consistent with the purposes of §1983. The *Weeks* Court, in words more elegant than Petitioner could compose, succinctly stated why the *Carter* application is inconsistent with federal law:

A strict application of the Alabama wrongful death statute in cases involving municipal or county liability cannot be justified under the Robertson Court's analysis. The Alabama statute provides for the recovery only of punitive damages, but municipalities and counties are immune from these damages in actions under §1983. Thus, the strict application of the Alabama statute in such cases would result in the complete immunization of those entities from damages, at least in cases where the decedent's death resulted from their wrongful acts. Alabama municipalities and counties would know, in advance, that they would never be monetarily liable under §1983 for acts that cause deprivations of constitutional rights as long as the victims die. The policy of deterrence of official misconduct that underlines §1983 would obviously be severely undermined if the Alabama wrongful death statute is applied in a way that eliminates municipal and county liability in such cases. Moreover, §1983's policy of compensating the victims of official misconduct would also be undermined.

Weeks, 649 F. Supp. at 1305.

Mindful of the two goals of compensation and deterrence in a §1983 claim, *See, Hardin v. Straub*, 490 U.S. 536, 539 (1989) (Chief goals of §1983 action are compensation and deterrence); *Board of Regents of Univ. of New York v. Tomanvo*, 446 U.S. 478, 488 (1980); *Owen v. City of Independence*, 445 U.S. 622, 651 (1980), the *Weeks* Court held that the Alabama Wrongful Death Act should not be applied in such a way that a plaintiff's §1983 action evaporates when life evaporates.

This Court therefore holds that, in actions under §1983, where the liability of a municipality, county, or other local governmental entity is at

issue, and where the alleged unconstitutional acts result in the death of the victim, the Alabama wrongful death act should be applied only to the extent that the decedent's action is permitted to survive. The wrongful death statute should not be held to foreclose the recovery of compensatory damages against the governmental entity in question, for such a result would be inconsistent with the policies underlying §1983.

Id. Petitioner seeks only a decision from this Court bringing the Alabama Supreme Court in line with what was obvious to the *Weeks* Court, and has been obvious to courts across the country. *See, infra*. A decision that would result in the complete immunization of governmental entities in Alabama from damages where those entities' wrongful acts cause death provides neither compensation for the victims of constitutional wrongs, nor deterrence to those who would commit them.

1. Courts Have Consistently Held That State Law Damage Restrictions Such As Alabama's Wrongful Death Act Are To Be Disregarded When They Conflict With §1983 Policy.

The analysis of the *Weeks* Court is well accepted across the nation as a proper application of the *Robertson* test. For example, in *McFadden v. Sanchez*, 710 F.2d 907 (2d Cir.), cert. denied, 464 U.S. 961 (1983), the Second Circuit held that the application of a state provision such as that adopted by the Alabama Supreme Court in this case is inconsistent with the Constitution and laws of the United States. In *McFadden*, a §1983 action was brought against a police officer arising out of the shooting of the plaintiff's decedent by the officer. The jury awarded punitive damages to the plaintiff. The defendant appealed, arguing that punitive damages in such cases were barred by a New York statute preventing the survival of claims

for punitive damages after the death of plaintiff's decedent. The Second Circuit, relying on the *Robertson* analysis, stated the following:

We have no doubt that limitations in a state survival statute have no application to a section 1983 suit brought to redress a denial of rights that caused the decedent's death. [citations omitted] To whatever extent section 1988 makes state law applicable to section 1983 actions, it does not require deference to a survival statute that would bar or limit the remedies available under section 1983 for unconstitutional conduct that causes death. State law that would preclude a claim for punitive damages in a case like the present one is "manifestly inconsistent" with federal law within the meaning of section 1988.

McFadden, 710 F.2d at 911. Similarly, the Alabama Supreme Court holding that would immunize municipalities from §1983 liability in death cases is "manifestly inconsistent" with federal law.

The following decisions similarly show that state law restrictions will not be upheld when the effect is to destroy a federal cause of action. *Heath v. City of Hialeah*, 560 F. Supp. 840 (S.D. Fla. 1983) (refusing to apply Florida statute's ban on the recovery of decedent's damages); *Sager v. City of Woodland Park*, 543 F. Supp. 282 (D. Colo. 1982) (refusing to apply restrictions on recoverable damages in Colorado statutes); *O'Connor v. Several Unknown Correctional Officers*, 523 F. Supp. 1345 (E.D. Va. 1981) (refusing to apply the Virginia wrongful death statute's bar on recovery of decedent's damages or punitive damages).

Lastly, in *Williams v. City of Oakland*, 915 F. Supp. 1074 (N.D. Cal. 1996) a §1983 action was brought against the City of Oakland and its police officers arising out of an

unlawful search and seizure. After the lawsuit was filed, the plaintiff died of unrelated causes. The question before the Court was whether pain and suffering damages, which are recoverable in a §1983 action, would abate with the death of the decedent pursuant to California statute. The *Williams* Court, citing *Robertson, supra*, stated that a denial of pain and suffering damages "would strike at the very heart of a section 1983 action. *Williams*, 915 F. Supp. at 1077, quoting *Guyton v. Phillips*, 532 F. Supp. 1154, 1167 (N.D. Cal. 1981). The Court held that application of the California statute in such a way as to take away a key component of the damages for a §1983 action would be inconsistent with the laws and Constitution of the United States. The Alabama Supreme Court, however, continues to apply the Alabama Wrongful Death Act in a way that is inconsistent with the underlying purposes of a §1983 action, and in a manner consistently rejected across the country. The only way to bring the Alabama Supreme Court into line with the well accepted federal authority in this area is a grant of Certiorari in this case.

The holding in *Weeks, supra*, has affirmatively adopted the correct approach in applying the Alabama Wrongful Death Act to a §1983 action. Moreover, the Eleventh Circuit has recognized that *Carter* is not a correct expression of federal law. In *Gilmere v. City of Atlanta*, 846 F.2d 734 (11th Cir. 1989), the Court recognized that the application of Alabama's Wrongful Death Act in the manner it has been applied by *Carter* is inconsistent with the laws and Constitution of the United States.

The Alabama Wrongful Death Statute, Ala. Code §6-5-410, provides only for assessment of punitive damages. *Carter v. City of Birmingham*, 444 So. 2d 373 (Ala. 1983), cert denied, 467 U.S. 1211, 104 S.Ct. 2401 (1984). Because this

statute is inconsistent with the rule that damages in §1983 actions are to be compensatory, reliance on the Alabama wrongful death statute would not be proper under §1988. *See, Weeks v. Benton*, 649 F. Supp. 1297 (S.D. Ala. 1986).

Gilmore, 564 F.2d at 740, n.7.¹ It is clear that the federal courts passing on the issue have seen the inconsistency in the application of the Alabama Wrongful Death Act to §1983 actions under *Carter*.

2. U. S. Supreme Court Authority Shows That The Application Of The Alabama Wrongful Death Act Urged By Defendant Is Inconsistent With The Purposes Of §1983.

The reason that federal courts have consistently rejected *Carter* is that, while state courts may entertain federal §1983 actions, local forms of practice cannot defeat established federal rights. *Felder v. Casey*, 108 S.Ct. 2302 (1988). In *Felder*, a motion to dismiss was granted a municipal defendant on a §1983 claim because the plaintiff failed to comply with Wisconsin's notice-of-claim statute. The Court held that the notice-of-claim statute could not act as a bar to a federal §1983 action. In reaching its decision the *Felder* Court held:

¹The Alabama Supreme Court's utter disdain for the proper application of the Alabama Wrongful Death Act in this context is further illustrated by its failure to follow its own precedent, which would lead it to follow *Gilmore* and *Weeks* as binding federal appellate court precedent on a federal issue. In *Central of Georgia Rwy Co. v. Ramsey*, 275 Ala. 7, 151 So. 2d 725 (1962), the Alabama Supreme Court held that "decisions of federal courts, construing federal statutes, in the absence of a contrary holding by the Supreme Court of the United States, are binding on us. *Central Rwy of Ga.*, 151 So. 2d at 730, citing *Dickey v. West Boylston Mfg. Co.*, 251 Ala. 19, 36 So. 2d 106 (1948). However, the same Court has refused to follow the holding in *Gilmore*, directly rejecting the *Carter* analysis, and the holding in *McFadden* showing that the *Carter* analysis is faulty.

Just as federal courts are constitutionally obligated to apply state law to state claims, *see Erie B. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), so too the Supremacy Clause imposes on state courts a constitutional duty "to proceed in such a manner that all the substantial rights under controlling federal law are protected."

Felder, 108 S.Ct. at 2313-14, citing *Garrett v. Moore-McCormack Co.*, 63 S.Ct. 246, 251 (1942). Similarly, if the Alabama Wrongful Death Act is applied as Defendant urges, the substantive rights of equal protection denied Mrs. Jefferson cannot be remediated.

The *Felder* Court, in refusing to allow a state notice of claim statute to abrogate an otherwise proper §1983 claim, realized the supremacy of the federally created right in such cases.

Thus, §1983 provides "a uniquely federal remedy against incursions . . . upon rights secured by the Constitution and laws of the Nation," *Mitchum v. Foster*, 407 U.S. 225, 239, 92 S.Ct. 2151, 2160, 32 L.Ed.2d 705 (1972), and is to be accorded "a sweep as broad as its language." *United States v. Price*, 383 U.S. 787, 801, 86 S.Ct. 1152, 1160, 16 L.Ed.2d 267 (1966).

* * *

Accordingly, we have held that a state law that immunizes government conduct otherwise subject to suit under §1983 is preempted, even where the federal civil rights litigation takes place in state court, because the application of the state immunity law would thwart the congressional remedy.

Felder, 108 S.Ct. at 2307. The Alabama Supreme Court has refused to follow this mandate. Both *Carter* and the

present case illustrate its utter disdain for the principle of supremacy articulated in *Felder*.

3. *The Alabama Supreme Court's Decisions In Carter And The Present Case Do Not Offer An Adequate Remedy For The Victims Of Official Misconduct.*

The opinion of the Alabama Supreme Court in this case states, quoting *Carter*, that the purpose of §1983 liability is not defeated because state law recognizes an analogous cause of action under the Alabama Wrongful Death Act. This is simply not true.

First, the Alabama Wrongful Death Act claim in this case is wholly inadequate. It is inadequate because recovery on such state law claims in Alabama is capped at \$100,000.00 by Ala. Code §11-93-2 (1975). Second, the provision of a similar state law cause of action in no way replaces the federal right to bring an action for redress of constitutional wrongs under §1983. In *Monroe v. Hape*, 81 S.Ct. 473 (1961), a police officer against whom a §1983 action was brought argued that said action was unnecessary because of a similar state action. The Court rejected this argument, stating:

It is no answer that the state has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy . . .

Monroe, 81 S.Ct. at 482.

Similarly, the Court in *Williams*, *supra*, relying on *Carey v. Phipps*, 435 U.S. 245 (1978), recognized that a state law tort action may not be adequate to remediate a constitutional deprivation. In *Williams*, the issue was whether a California statute cutting off pain and suffering damages at death would be applied to a §1983 action. In holding such an application to be inconsistent with the Constitution and laws of the United States, the Court held "to

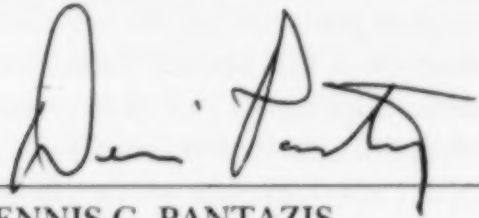
deny pain and suffering damages would strike at the very heart of a section 1983 action . . . absent such a remedy, the section 1983 action amounts to little more than a tort claim." *Williams*, 918 F. Supp. at 1077, quoting *Guyton v. Phillips*, 532 F. Supp. 1154, 1167 (N.D. Cal. 1981). Simply put, just as the *Williams* Court found it to be inconsistent to disallow pain and suffering damages in a §1983 action because of a California limitation on tort actions, the Alabama Supreme Court's decisions that totally eliminate §1983 actions in death cases — leaving litigants with only a capped tort remedy — is wholly inconsistent with the purposes of a §1983 action. *See, Carey*, 435 U.S. at 258 (purpose of §1983 action defeated if injuries caused are uncompensated due to common law restrictions of "analogous" state action).

CONCLUSION

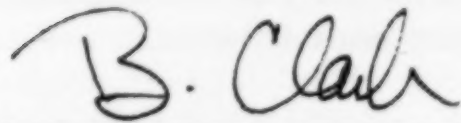
The Alabama Supreme Court has simply refused to properly apply §1983 to death actions brought on §1983 claims against public entities. The Alabama Supreme Court's application of the Alabama Wrongful Death Act in a way that totally insulates municipalities from §1983 liability when death results from the constitutional deprivation, rather than from a lesser injury, is manifestly inconsistent with the purposes of underlying a §1983 action. This Court has held that the Supremacy Clause dictates that the application of state restrictions in §1983 actions goes only so far as such restrictions do not conflict with federally granted rights and actions. Courts around the Country have held that where the application of a state statute would severely restrict such rights, the state law restrictions must yield. This petitioner merely asks this Court to bring Alabama into line with these decisions, and to put an end to the Alabama Supreme

Court's elimination of §1983 death claims due to state procedural rules which, under the federal decisions cited herein, must yield.

RESPECTFULLY SUBMITTED,



DENNIS G. PANTAZIS
Counsel of Record



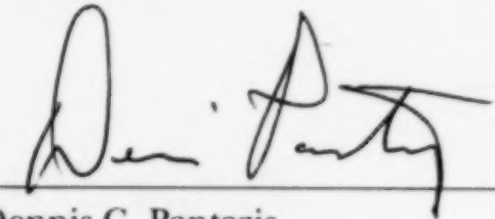
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CERTIFICATE OF SERVICE

This is to certify that three copies of the above and foregoing have been served by United States mail, postage prepaid and properly addressed on counsel for the Respondents, John W. Clark, Jr. and Wayne Morse, CLARK & SCOTT, P.C., 3500 Blue Lake Drive, Suite 350, Birmingham, Alabama 35243-1907.

This the 21 day of November, 1996.



Dennis G. Pantazis

APPENDIX

A-1

APPENDIX A-I

SUPREME COURT OF ALABAMA

SPECIAL TERM, 1996

1941573

City of Tarrant, Alabama

v.

Melvin Jefferson, et al.

Appeal from Jefferson Circuit Court
(CV-94-4523)

MADDOX, JUSTICE:

Pursuant to Rule 3, Ala.R.App.P., we permitted the defendant City of Tarrant to appeal from an interlocutory order in which the trial court held that the question of the survivability of Alberta K. Jefferson's cause of action for compensatory damages under 42 U.S.C. § 1983 was governed by federal common law rather than by Alabama's Wrongful Death Act, § 6-5-410, Ala. Code 1975. The plaintiff Melvin Jefferson, Alberta's son, sues individually and as a personal representative for the estate of the decedent. He alleges that Tarrant firefighters, based upon a policy of selectively denying fire protection to minorities, purposefully refused to attempt to rescue and revive Alberta.

Facts

Melvin Jefferson claims that city firefighters violated Alberta Jefferson's civil rights, specifically that they intentionally, negligently, wantonly, or carelessly failed to attempt to extricate her from her burning house and thereby caused her wrongful death, a death that would be actionable under § 6-5-410, Ala. Code 1975. The defendant city moved for a judgment on the pleadings, specifically as to those claims seeking compensatory damages under 42 U.S.C. § 1983; the court denied the city's motion, and this Court permitted an appeal from the denial. The defendant city maintains that the question of the survivability of Alberta Jefferson's § 1983 cause of action against the municipality is governed by Alabama law rather than federal common law, and that the trial judge erred in holding otherwise when he denied the city's motion for a judgment on the pleadings.

Issue

Is the question of the survivability of Alberta Jefferson's cause of action for compensatory damages under 42 U.S.C. § 1983 governed by federal common law or by reference to the Alabama Wrongful Death Act. This Court addressed this same issue in *Carter v. City of Birmingham*, 444 So. 2d 373 (Ala. 1983) cert. denied, 467 U.S. 1211 (1984). Also see, *Blair v. City of Rainbow City*, 542 So. 2d 275 (Ala. 1989). This issue arises because no federal statute provides for the survivability of § 1983 claims; moreover, federal law prohibits a § 1983 award of punitive damages against a municipality¹ and compensatory damages are not available under Alabama's Wrongful Death Act, which allows an award of punitive damages only.²

¹ *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981).

² See, e.g., *Atkins v. Lee*, 603 So. 2d 937 (Ala. 1992).

Analysis

The trial court was aware of this Court's holding in *Carter*, but held that *Weeks v. Benton*, 649 F. Supp. 1297 (S.D. Ala. 1986), had, in effect, overruled *Carter*.

We have examined the principles of law stated in *Weeks* and have also re-examined the principles of law stated in *Carter*. We conclude that *Carter* correctly denied this issue. We should also note that the Supreme Court of the United States denied certiorari review of the *Carter* decision.

The rationale of *Weeks* appears to be that the application of § 6-5-410 in § 1983 actions is inconsistent with the Constitution and laws of the United States. The pertinent federal statute provides: "In all cases where [the laws of the United States] are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same as not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause." 42 U.S.C. § 1988.

In *Carter* this Court, when confronted with this same issue, concluded that § 6-5-410 was not inconsistent with the Constitution and laws of the United States, citing *Robertson v. Wegmann*, 436 U.S. 584 (1978), which held that a § 1983 action would abate in accordance with Louisiana's survivorship statute. *Carter* is based in part upon *Brown v. Morgan County*, 518 F. Supp. 661 (N.D. Ala. 1981), which held that compensatory damages are not recoverable in § 1983 actions based on Alabama's Wrongful Death Act. The *Brown* court distinguished the *Brown* case from *Robertson* by noting that the Louisiana

abatement statute "[was obviously more restrictive than the Alabama wrongful death act" and that, "like the Louisiana survival statute under consideration in *Robertson*, the Alabama death act should not be disregarded and cannot be considered 'inconsistent' with federal law merely because the statute provides for recovery of only punitive damages. *Brown*, 518 F. Supp. at 663-65, quoted in *Carter*, 444 So. 2d at 377. *Robertson* states simply that state law applies in § 1983 actions seeking recovery for wrongful death unless, upon application of § 1988, it is found to unduly restrict the federal claim, *Carter*, 444 So. 2d at 377, and it states that "[a] state statute cannot be considered 'inconsistent' [or unduly restrictive] with federal law merely because the statute causes the plaintiff to lose the litigation." 436 U.S. at 593.

Furthermore, as noted earlier, the United States Supreme Court has held that a plaintiff cannot recover punitive damages against a municipality under § 1983. *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981). Therefore, as *Carter* states: "[S]tate law affords a remedy beyond that now permitted under federal law—punitive damages. Thus, the application of state law . . . does not, in substance, abrogate plaintiff's remedy against the city for violations of § 1983, but rather expands the recovery." *Carter*, 444 So. 2d at 379 (emphasis omitted).

"The interests sought to be protected by the Alabama wrongful death statute closely parallel the interests to be protected where death results from violations [that give rise to liability under] § 1983. Thus, the purpose of § 1983 is not defeated, nor are cities insulated from liability under § 1983, because the law of Alabama does recognize an analogous cause of action [§ 6-5-410, Ala. Code 1975], affording an appropriate remedy in death cases."

444 So. 2d at 380 (emphasis omitted).

This Court held in *Carter* that § 6-5-410, Ala. Code 1975, is not inconsistent with the Constitution and laws of the United States. We reaffirmed that holding in *Blair v. City of Rainbow City*, 542 So. 2d at 275 (Ala. 1989). We have re-examined the principles of law stated in *Carter* and *Blair*, and we conclude that the holding in those cases is still sound. The order of the trial court is reversed, and the cause is remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

Hooper, C.J., and Shores, and Kennedy, JJ., concur.

Butts, J., concurs in the result.

Houston and Cook, JJ., dissent.

City of Tarrant. Alabama v. Melvin Jefferson, et al.

HOUSTON, JUSTICE (dissenting).

I am faced with a dilemma. Should I adhere to the doctrine of state decisis, knowing that the precedent upon which I rely (*Tatum v. Schering Corp.*, 523 So.2d 1042, 1049-63 (Ala. 1988)) was wrongly decided? To follow it would be to deny the plaintiff Melvin Jefferson a remedy. Or should I follow the law as I believe it to be, although what I believe the law to be is contrary to the opinion of the majority? To follow what I believe the law to be would afford Melvin Jefferson, as personal representative of the estate of Alberta K. Jefferson, deceased, a remedy through his action under 42 U.S.C. § 1983. If a constitutional doctrine was involved, I would follow Justice Scalia's dissent in *BMW of North America, Inc. v. Gore*, [Ms. 94-896, May 20, 1996], ___ U.S. ___, ___ S.Ct. ___ (1996), as I did in *Ex parte Knotts*, [Ms. 1950239, July 12, 1996], ___ So.2d ___ (Ala. 1996) (Houston, J., concurring in the result). In this case, no constitutional issue is involved; however, I am convinced that this Court has erroneously interpreted Ala. Code 1975, § 6-5-410 (to hold that only punitive damages can be recovered in wrongful death cases), and I cannot expand this erroneous interpretation of § 6-5-410 to § 1983 actions and deprive Melvin Jefferson (or other plaintiffs similarly situated) of a right to a remedy, which after much research and analysis, I wholeheartedly believe that he and those similarly situated have. *Tatum v. Schering Corp.*, supra (Houston J., dissenting). Therefore, I respectfully dissent.

City of Tarrant, Ala. v. Melvin Jefferson, et al.

COOK, JUSTICE (dissenting).

I respectfully dissent. This Court should affirm the trial court's holding that application of the state's wrongful death statute in this fact situation would be inconsistent with the policy underlying the 42 U.S.C. § 1983 cause of action.

The majority's holding that Alabama's wrongful death statute determines whether Alberta Jefferson's § 1983 federal cause of action survives is based on this Court's opinion in *Carter v. City of Birmingham*, 444 So. 2d 373 (Ala. 1983), and *Blair v. City of Rainbow City*, 542 So. 2d 275 (Ala. 1989). I agree with the reasoning of Justice Jones and Justice Adams, who wrote specially in *Carter* and *Blair*, respectively, and who disagreed with the idea that Alabama municipalities are exempt from a wrongful death action under § 1983 because the state recognizes an analogous cause of action.

This Court in *Carter*, based on an analysis of *Robertson v. Wegmann*, 436 U.S. 584 (1978) (holding that a § 1983 action would abate in accordance with Louisiana's survivorship statute), and *Brown v. Morgan County*, 518 F. Supp. 661 (N.D. Ala. 1981), determined that a close parallel exists between the interests being protected in actions brought under the Alabama Wrongful Death Statute and interests involved in cases where death results from violations that would give rise to liability under § 1983. Therefore, *Carter* reasoned, the purpose of § 1983 was not defeated, because under the Alabama Wrongful Death Act an appropriate remedy is provided in death cases.

The view more in accord with the policy of § 1983 is expressed in the more recent opinion of *Weeks v. Benton*, 649 F. Supp. 1297 (S.D. Ala. 1986). In *Weeks*, the administratrix of a deceased county jail inmate sued Baldwin

County commissioners and others under § 1983, alleging violations of the inmate's rights. Judge Hand recognized in *Weeks* that (1) the *Robertson* holding was a narrow one, limited to situations in which the application of the state survivorship law does not adversely affect the § 1983 policies of compensation and deterrence, and (2) that the *Robertson* analysis could not defend the strict application of the state's wrongful death statute in cases where alleged-wrongful acts of a municipality or county resulted in the decedent's death. Such an application would allow those entities to operate with immunity from § 1983 actions based on deprivations of constitutional rights, so long as the victims of those deprivations die. *Weeks*, 649 F. Supp. at 1305-06. Providing what is in essence partial immunity to municipalities in death, cases is inconsistent with the § 1983 policy of deterrence. Addressing this issue, Judge Hand wrote:

"A strict application of the Alabama wrongful death statute in cases involving municipal or county liability cannot be justified under the *Robertson* court's analysis. The Alabama statute provides for the recovery only of punitive damages, but municipalities and counties are immune from these damages in actions under § 1983. Thus, the strict application of the Alabama statute in such cases would result in the complete immunization of those entities from damages, at least in cases where the decedent's death resulted from their wrongful acts. Alabama municipalities and counties would know, in advance, that they would never be monetarily liable under § 1983 for acts that cause deprivations of constitutional rights as long as the victims die. The policy of deterrence of official misconduct that [underlies] § 1983 would obviously be severely undermined if the Alabama wrongful death statute is applied in a way that

eliminates municipal and county liability in such cases. Moreover, § 1983's policy of compensating the victims of official misconduct would also be undermined. The *Robertson* Court specifically noted that its decision was not intended to 'preclude recovery by survivors who are suing under § 1983 for injury to their own interests.'

649 F. Supp at 1305-06.

In *Robertson*, the decedent had no immediate survivors, so the executor was suing only on the estate's behalf. Alberta Jefferson has several survivors including the plaintiff Melvin Jefferson.

I agree with Justices Jones and Adams that "[w]e should either fashion a remedy allowing recovery of compensatory damages, or we should resort to the federal common law of survival, which allows compensatory damages as the appropriate relief." *Carter*, 444 So. 2d at 380 (Jones, J., concurring in part and dissenting in part); *Blair*, 542 So. 2d at 278 (Adams, J., concurring specially and quoting Justice Jones's statement). Moreover, because I also agree with the analysis in *Weeks*, that Alabama's wrongful death statute should not be held to foreclose the recovery of compensatory damages under § 1983, I respectfully dissent.

APPENDIX A-II

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

§ 1988. Proceedings in vindication of civil rights

(a) Applicability of statutory and common law

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of titles 13, 24, and 70 of the Revised Statutes for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction

of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

(b) Attorney's fees

In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 [20 U.S.C.A. § 1681 et seq.], the Religious Freedom Restoration Act of 1993 [42 U.S.C.A. § 2000bb et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000d et seq.], or section 13981 of this title,¹ the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

(c) Expert fees

In awarding an attorney's fee under subsection (b) of this section in any action or proceeding to enforce a provision of section 1981 or 1981a of this title, the court, in its discretion, may include expert fees as part of the attorney's fee.

¹So in original.

ARTICLE 23.

DEATH.

§ 6-5-410. Wrongful act, omission or negligence causing death.

(a) A personal representative may commence an action and recover such damages as the jury may assess in a court of competent jurisdiction within the state of Alabama, and not elsewhere, for the wrongful act, omission or negligence of any person, persons or corporation, his or their servants or agents, whereby the death of his testator or intestate was caused, provided the testator or intestate could have commenced an action for such wrongful act, omission or negligence if it had not caused death.

(b) Such action shall not abate by the death of the defendant, but may be revived against his personal representative and may be maintained though there has not been prosecution, conviction or acquittal of the defendant for the wrongful act, omission or negligence.

(c) The damages recovered are not subject to the payment of the debts or liabilities of the testator or intestate, but must be distributed according to the statute of distributions.

(d) Such action must be commenced within two years from and after the death of the testator or intestate.